RECENT SIGNIFICANT DECISIONS

AIR21, 29 CFR Part 24, and 29 CFR Part 1978
Whistleblower Cases

April 3, 2002

U.S. Department of Labor
Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

Thomas M. Burke
Associate Chief Judge for
Black Lung and Traditional

Highlights of this issue:

AIR21 Decisions

AIR21 regulations published; standards of proof; definition of employee; responsibility of crew v. captain; objectively reasonable standard; definition of air carrier; subpoena authority

Nuclear and Environmental Decisions

II. Filing requirements, generally
amendment to name additional parties; oral complaint

III. Time Limits on Filing
indicia of filing

IV. Equitable tolling of filing period
mental incapacity

V. OSHA Investigation
remand

VI. Request for Hearing
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VII. Proceedings Before OALJ
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VIII. Powers, Responsibilities and Jurisdiction of ALJ, Secretary and Federal Courts
interlocutory appeals disfavored

IX. Miscellaneous Procedural Issues
remand, judicial efficiency; stay for resolution of constitutional issue; disqualification of counsel

XI. Burden of Proof and Production

A. Prima Facie Case

burden shifting guidelines in pre-1992 ERA amendment cases

C. Pretext

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absence of highway use tax sticker; calling in sick

VI. Adverse action

dispatcher apologized and permitted Complainant to take a break

X. Settlements

oral acceptance at hearing

XI. Dismissals

failure to prosecute; misconduct of complainant; certification of facts to district court

AVIATION INVESTMENT AND REFORM ACT FOR THE 21ST CENTURY ["AIR 21"] WHISTLEBLOWER DECISIONS

AIR21 PROCEDURAL REGULATIONS PUBLISHED

On April 1, 2002, OSHA published in the Federal Register an **Interim Final Rule: Procedures for the Handling of Discrimination Complaints Under Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 29 CFR Part 1979, 67 Fed. Reg. 15453**. The rule "establishes procedures and time frames for the handling of complaints under AIR21, including procedures and time frames for employee complaints to the Occupational Safety and Health Administration ("OSHA"), investigations by OSHA, appeals of OSHA determinations to an administrative law judge ("ALJ") for a hearing de novo, hearings by ALJs, appeal of ALJ decisions to the Administrative Review Board (acting on behalf of the Secretary) and judicial review of the Secretary's final decision."

APPEALS PROCESS FOR AIR21 CASES; ARB REQUIRES SUBMISSION OF PETITION FOR REVIEW RATHER THAN AUTOMATIC REVIEW

In ***Bodine v. International Total Services***, 2001-AIR-4 (ARB Feb. 28, 2002), the ALJ had issued a Recommended Decision and Order. Because DOL had not yet enacted regulations governing the procedures to be followed to obtain Administrative Review Board review of Recommended Decisions and Orders, the ALJ referred the case to the Board for review. The ARB thereafter issued an order directing the parties to submit petitions for review, if they were interested in further review, and informing them that if no petitions for review were timely received, the Board would issue an order closing the case, and the ALJ's Recommended Decision and Order would become the Secretary of Labor's final order as provided in 49 U.S.C. §42121(b)(3)(A). Because neither party submitted a petition or expressed interest in doing so when contacted by telephone, the ARB issued the instant order directing that the ALJ's decision be considered the final administrative order, and closing the case.

APPLICABLE JURISPRUDENCE AND STANDARDS OF PROOF IN AIR21 CASES

In ***Taylor v. Express One International, Inc.***, 2001-AIR-2 (ALJ Feb. 15, 2002), the ALJ examined the legislative history and statutory language of the employee protection provision of AIR21, and concluded that "the decisional law developed under the whistleblower protective provisions of the ERA, as amended in 1992, the Whistleblower Protection Act and environmental statutes provide the framework for litigation arising under AIR21." Slip op. at 34. The ALJ wrote:

> The statutory scheme established by AIR21 essentially mirrors the protective provisions of the prevailing nuclear and environmental statutes. The exceptions are that AIR21 provides extraordinary powers to OSHA to order immediate reinstatement of airline employees upon a showing of reasonable cause and places

> a more stringent "clear and convincing" standard upon an employer in defense of its adverse employment action. Accordingly, the jurisprudence developed by the Secretary of Labor for existing whistleblower statutes will be applied to the instant case.

Slip op. at 35. Thus, the ALJ outlined the standards of proof that would be applied in an AIR21, beginning with the burden-shifting framework described in *Trimmer v. United States Department of Labor*, 174 F.3d 1098, 1101 (10th Cir. 1999). The ALJ found that the following are the elements of a *prima facie* case in an AIR21 whistleblower case:

> (1) that the employer is governed by the Act;
> (2) that he engaged in protected activity as defined by AIR21;
> (3) that as a result of such activity, he suffered adverse employment action, such as discharge; and
> (4) that a nexus existed between the protected activity (as a contributing factor) and the adverse action or circumstances are sufficient to raise an inference that the protected activity was likely a contributing factor in the unfavorable action.

The ALJ observed that the foregoing creates an inference of unlawful discrimination, and that with respect to the nexus requirement, proximity in time is sufficient to raise an inference of causation.

In regard to interpretation of the "contributing factor" requirement, the ALJ adopted the definition stated in *Marano v. Department of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993), interpreting the Whistleblower Protection Act, 5 U.S.C. § 1221(e)(1):

> The words "a contributing factor" . . . mean <u>any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision</u>. This test is specifically intended to overrule existing case law, which requires a whistleblower to prove that his protected conduct was a "significant," "motivating," "substantial," or "predominant" factor in a personnel action in order to overturn that action.

The ALJ found that if a Complainant presents a *prima facie* case showing that protected activity was likely a contributing factor in the unfavorable personnel action, then Respondent has an opportunity to demonstrate by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity.

The ALJ found that "[i]f Respondent meets its burden to produce a legitimate, nondiscriminatory reason for its employment decision, the inference of discrimination is rebutted, and Complainant must then assume the burden of proving by a preponderance of the evidence that Respondent's proffered reasons are 'incredible and constitute pretext for discrimination.'" slip op. at 37, quoting *Overall v. Tennessee Valley Authority*, Case No. 1997-ERA-53 @ 13 (ARB Apr. 30, 2001). The ALJ noted that "a rejection of an employer's proffered legitimate, nondiscriminatory explanation for

adverse action permits rather than compels a finding of intentional discrimination." Slip op. at 37, citing *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 519, 113 S.Ct. 2742, 2753 (1993).

Finally, the ALJ cited the U.S. Court of Appeals for the Eighth Circuit in *Carroll v. U.S. Department of Labor*, 78 F.3d 352, 356 (8th Cir. 1996), *aff'g Carroll v. Bechtel Power Corp.*, Case No. 1991-ERA-46 (Sec'y Feb. 15, 1995), where the court observed:

> But once the employer meets this burden of production, "the presumption raised by the *prima facie* case is rebutted, and the factual inquiry proceeds to a new level of specificity." Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 255 (1981). The presumption ceases to be relevant and falls out of the case. The onus is once again on the complainant to prove that the proffered legitimate reason is a mere pretext rather than the true reasons for the challenged employment action and the ultimate burden of persuasion remains with the complainant at all times. Burdine, 450 U.S. at 253, 256.

Thus, the ALJ concluded that "the fact a complainant has established a *prima facie* case becomes irrelevant. Rather, the relevant inquiry becomes whether Complainant has proven by a preponderance of the evidence that Respondent retaliated against him or her for engaging in a protected activity." Slip op. at 38 (citing *Carroll*, *supra* at 356).

See also ***Peck v. Safe Air International, Inc.***, 2001-AIR-3 (ALJ Dec. 19, 2001) (finding that the principles developed in environmental whistleblower cases were adaptable to AIR21 cases).

CONSOLIDATION OF CASES

In ***Davis v. United Airlines, Inc.***, 2001-AIR-5 (ARB Mar. 1, 2002), a motion was filed to consolidate the case with a case pending before a different ALJ on the ground that Complainants in both cases (who were represented by the same attorney) will be presenting evidence of Respondent's alleged unlawful policy of: (a) pressuring line mechanics to defer aircraft repairs contrary to United's written safety policies and FAA Regulations; and (b) disciplining mechanics who reported and/or complained about resulting safety violations and unsafe airplanes. In addition, Complainants asserted that identical testimony from management personnel and other mechanics will be presented twice if separate hearings are held.

The ALJ detailed the law applicable to consolidation of cases, and found that consolidation was not warranted under 29 C.F.R. § 18.11. The ALJ found that there was only a general commonality in the cases, which is not enough to warrant consolidation. The ALJ also found that, since common witnesses had not been identified, Complainants' argument of duplicative testimony was not supported. The ALJ found that consolidation would only delay the case closer to hearing at the expense of the case that was still in the discovery stage, and would actually cause confusion in the preparation of each party's case. The ALJ found that consolidation would cause undue expense and burden to Respondent as different law firms represented it in the two cases.

EMPLOYEE; CONVENTIONAL MASTER-SERVANT RELATIONSHIP TEST

In ***Peck v. Safe Air International, Inc.***, 2001-AIR-3 (ALJ Dec. 19, 2001), the ALJ found that AIR21 does not define the term "employee," and therefore the conventional master-servant relationship as defined by common-law agency doctrine is applicable. *Citing Reid v. Methodist Medical Center of Oak Ridge*, 1993-CAA-4 (Sec'y Apr. 3, 1995), which adopted the test found in *Nationwide Mut. Ins. Co. v. Darden*, 112 S. Ct. 1344 (1992).

In *Peck*, Complainant had been employed as Respondent's Director of Maintenance until February of 2000, when due to Respondent's financial problems, Complainant remained as Respondent's Director of Maintenance, but in exchange for free hanger space rather than a salary. After that date, Respondent no longer retained Complainant on its payroll or withheld federal taxes on behalf of Complainant. The ALJ weighed the various *Darden* factors, and found that the preponderance of the evidence supported a finding that Complainant was, after February 2000, an independent contractor, and not an employee.

The ALJ noted that in some circumstances a former employee can proceed with a whistleblower complaint, but found that those exceptions did not apply to the facts of the case.

Since the whistleblower complaint was grounded in a termination in May of 2002, and did not relate to or arise out of the earlier employment relationship, the ALJ held that Complainant was ineligible for relief under the employee whistleblower provision of AIR21.

EVIDENCE; ADMISSIBILITY OF PRE-AIR21 CONDUCT

In ***Taylor v. Express One International, Inc.***, 2001-AIR-2 (ALJ Dec. 5, 2001), the ALJ denied Respondent's motion to exclude evidence relating to pre-AIR21 activity, the ALJ ruling that such evidence is relevant if it has a temporal relationship to the adverse employment action, and was a "contributing factor" in the alleged unfavorable personnel action taken by Respondent. See also *Taylor v. Express One International, Inc.*, 2001-AIR-2 (ALJ Nov. 21, 2001), in which on ruling on a motion for summary decision the ALJ observed:

> Factually, it is apparent that Complainant alleges in his complaint filed with the undersigned and in the instant Response that he engaged in protected activity prior to the effective date of AIR21, but was terminated after the effective date. To the extent such alleged protected activity can be shown to be the basis of Respondent's motivation or intent to engage in adverse action against Complainant, Complainant is entitled to present such evidence in his case-in-chief. However, Complainant cannot rely upon such alleged events as evidence of independent violations by Respondent unless they were the subject of a properly filed and timely complaint under AIR21. (Emphasis added).

FILING OF COMPLAINT; REFERRAL OF COMPLAINT TO OSHA BY FAA OIG

In *Taylor v. Express One International, Inc.*, 2001-AIR-2 (ALJ Feb. 15, 2002), Complainant filed a complaint of discriminatory discharge for raising safety concerns within 90 days of his discharge with the FAA Inspector General. That complaint was then transmitted to OSHA. Respondent argued that the filing was ineffective under the employee protection provision of AIR21 because Complainant himself never filed a complaint with the Secretary of Labor, and because it was filed with FAA rather than the Secretary of Labor. The ALJ, however, found in his recommended decision and order that Complainant's filing with the FAA was sufficient to toll the time limit for filing a complaint under AIR21 under the equitable tolling principle of filing the precise statutory claim with the wrong forum.

FRIVOLOUS COMPLAINT

In ***Peck v. Safe Air International, Inc.***, 2001-AIR-3 (ALJ Dec. 19, 2001), Respondent sought attorney fees up to $1,000 pursuant to 49 U.S.C. § 42121(b)(3)(C) based on the allegation that Complainant's AIR21 employee discrimination complaint was either brought in bad faith or was frivolous. The ALJ observed that it was clear that the parties did not like each other, but found that there was insufficient evidence to find that the complaint was either brought in bad faith or was frivolous. The ALJ noted that the circumstantial evidence known to Complainant at the time he filed the complaint and his documentary evidence indicated a firm and sincere belief that he had been the victim of retaliatory termination. Although the ALJ had found that Complainant was not an "employee" within the meaning of AIR21, he found that Complaint had an understandable and not frivolous reason to think he was an employee, even if it was not a legally correct opinion. The ALJ also took into consideration that Complainant had to file his complaint within 90 days of the adverse employment action – before all the evidence would have become known.

LEGITIMATE, NON-DISCRIMINATORY REASON FOR ADVERSE EMPLOYMENT ACTION

PROTECTED ACTIVITY; REFUSAL TO FLY/WORK

In ***Lentz v. Sky King, Inc.***, 2001-AIR-1 (ALJ Feb. 14, 2001), the ALJ denied Respondent's motion for summary decision where, although Complainant had written to the FAA indicating that he had refused to fly with a fellow pilot, there was not clear and convincing evidence that the letter was communicated to Respondent, and where, although Complainant had sent a fax to Respondent indicating that he would not fly with the other pilot until he saw the other pilot's medical waiver, there was not clear and convincing evidence of the meaning of that communication, since it was unclear whether the fax was a refusal to fly or a merely an initial request to see the medical record.

The ALJ also found that, assuming that Complainant was fired solely for a refusal to fly, given the broad interpretation generally afforded the whistleblower rights of workers, especially when they relate to safety, a refusal to fly could be interpreted as protected activity under 49 U.S.C. § 42121,

if the refusal was motivated by the belief that flying would subject the worker and passengers to unsafe conditions, even though a literal reading of the statute does not specify "refusal to work" as protected conduct.

PRETEXT; DISPARATE TREATMENT IN DISCIPLINE OF CREW AND CAPTAIN

In ***Taylor v. Express One International, Inc.***, 2001-AIR-2 (ALJ Feb. 15, 2002), Complainant argued that discriminatory motive was established because he was treated differently than other crew members in response to an incident in which a tail stand was found to be still attached to the aircraft upon arrival at its destination. In his recommended decision, however, the ALJ found that application of the disparate treatment principle in whistleblower cases requires a showing that employees with whom a complainant seeks to compare himself are "similarly situated" The ALJ found that, as Captain, Complainant held a more responsible position with greater duties and authority than his subordinate First Officer and Flight Engineer. The ALJ also found that an employee's work and disciplinary history must be comparatively considered, and observed that Complainant had been counseled on several occasions. The ALJ also noted that the First Officer and Flight Engineer had also been disciplined – but for different actions or inactions – and therefore the difference in the discipline was not entitled to probative value in regard to pretext. The First Officer and Flight Engineer were disciplined for permitting the incident to occur, whereas Complainant was disciplined for failure to timely communicate the incident as required by company policy.

PROTECTED ACTIVITY; MUST INVOLVE FAA RULE AND MUST BE OBJECTIVELY REASONABLE

Finding that the principles developed in environmental whistleblower cases were adaptable to AIR21 cases, the ALJ in ***Peck v. Safe Air International, Inc.***, 2001-AIR-3 (ALJ Dec. 19, 2001), held that "a protected activity under AIR 21 has two elements. First, the complaint must involve a purported violation of an FAA regulation, standard or order relating to air carrier safety. Second, the complainant's belief about the purported violation must be objectively reasonable."

In *Peck*, the ALJ found that Complainant's complaint to a FAA inspector that the Hobbs meter had been tampered with, although meeting the first element, did not meet the second because of testimony that inaccurate readings, irregular accounting, and poor communications were the most likely cause for discrepancies rather than tampering. There was no evidence presented of actual evidence of tampering – only Complainant's lack of trust of the individuals who operated Respondent and his apparent belief that they were capable of tampering and that it was physically possible.

On the other hand, Complainant had also complained to the FAA inspector that Respondent's aircraft would overfly its next required maintenance inspection, and the evidence of record did support his concern about an overflight, even though the FAA inspector ultimately determined that no overflight had occurred.

PUNITIVE DAMAGES NOT AVAILABLE UNDER AIR21

In his recommended decision and order in ***Peck v. Safe Air International, Inc.***, 2001-AIR-3 (ALJ Dec. 19, 2001), the ALJ found that punitive damages are not an available remedy under AIR 21. *See* 49 U.S.C. § 42121(b)(3)(B).

SUBJECT MATTER JURISDICTION; AIR21 DEFINITION OF "AIR CARRIER" COVERS BOTH PRIVATE AND COMMON CARRIERS

In a order issued prior to promulgation of AIR21 regulations, the ALJ in ***Lentz v. Sky King, Inc.***, 2001-AIR-1 (ALJ Feb. 14, 2001), rejected Respondent's motion to dismiss for lack of subject matter jurisdiction. The motion was grounded in the theory that Respondent was not an "air carrier" within the meaning of AIR21, because it is a private carrier, and, according to Respondent, AIR21 only covers common carriers. The ALJ, however, found that the term "air carrier" under 49 U.S.C. § 42121 is a general term that includes both common carriers and private carriers.

SUBPOENA AUTHORITY

In ***Taylor v. Express One International, Inc.***, 2001-AIR-2 (ALJ Dec. 6, 2001), the Office of the Solicitor of Labor, on behalf of the Secretary of Labor, moved to quash subpoenas served on two OSHA employees on the ground that AIR21 did not grant subpoena authority to the Department of Labor. Finding persuasive and well-reasoned the ALJ's order on the same issue in *Peck v. Island Express*, 2001-AIR-3 (ALJ Aug. 20, 2001), to the effect that an ALJ is bound by the decision of the ARB in *Childers v. Carolina Power & Light Co.*, ARB No. 98-077, ALJ No. 1997-ERA-32 (ARB Dec. 29, 2000), the ALJ found that OALJ had the authority to issue the subpoenas, and finding that the testimony of the OSHA employees was important in determining the threshold issue of timely filing of the complaint, declined to quash the subpoenas. The ALJ, however, held that the scope of their testimony would be limited to the timeliness of filing issue.

II. Filing requirements, generally

[Nuclear & Environmental Whistleblower Digest II B 1 b]
AMENDMENT OF COMPLAINT TO NAME ADDITIONAL PARTIES

In ***Ewald v. Commonwealth of Virginia Dept. of Waste Management***, 1989-SDW-1 (ALJ Dec. 5, 2001), Complainant sought to amend her complaint to name two individuals who were, according to Complainant, "the primary perpetrators" of the alleged retaliation, and the federal Environmental Protection Agency. Respondent contended that addition of the individuals was barred by the statute of limitations, and that under FRCP 15(c)(3) there was no tolling because Complainant made no mistake in identity when she brought the action. The ALJ found that FRCP 15(c)(3) was not applicable, but that 29 C.F.R. § 18.5(e) governed – that regulation providing that a complaint may be amended after the answer "if the administrative law judge determines that the amendment is reasonably within the scope of the original complaint."

Although the ALJ found that the Secretary's decision in *Wilson v. Bolin Associates, Inc.*, 1991-STA-4 (Sec'y Dec. 30, 1991), established that individuals may be named as party respondents, it also weighed due process considerations under section 18.5(e) when an amendment involves adding a party. The ALJ found the individuals sought to be named, although deposed over 10 years earlier, had not been shown to have received any further notice of the filings and issuances in the case, nor participated in any other manner at any stage of the proceedings. Similarly, the ALJ found that EPA had no involvement in the matter for over a decade, even if, as alleged by Complainant, it played a role in Complainant's termination from employment. Thus, the ALJ found that due process considerations weighed against adding the individuals and EPA as parties.

Complainant also sought to add, in his or her individual capacity, the current head of the Commonwealth's EPA. The ALJ concluded that any remedial action taken by this person would be in an official and not individual capacity, and that mere succession to an office in public service does not expose a blameless official to individual liability exposure for the actions of his or her predecessors.

[Nuclear & Environmental Whistleblower Digest II B 3 b]
FILING; ORAL COMPLAINT CODIFIED IN WRITING BY GOVERNMENT OFFICIAL

Although rendered moot because the ALJ found that Complainant failed to file any complaint within the 180 day time period for filing an ERA whistleblower complaint, the ALJ in ***Wynn v. United States Enrichment Corp.***, 2001-ERA-23 (ALJ Mar. 25, 2002), addressed Respondent's argument that the complaint also failed because it was lodged orally in a telephone conversation that had never been reduced to writing. (The formal record, however, indicated that the following OSHA record

had been made: "Allegation: Wrongfully discharges and accused him of falsifying records.") The ALJ concluded that "I would suggest that a written document in the handwriting of a government official which codifies remarks made in a telephone conversation by a potentially aggrieved employee satisfies the statutory filing requirement."

III. Time limits on filing

[Nuclear & Environmental Whistleblower Digest III B 3]
TIMELINESS OF COMPLAINT; INDICIA THAT COMPLAINT NOT FILED – FAILURE TO PRODUCE DURING ADMINISTRATIVE PROCEEDING ON TIMELINESS; LACK OF RECORDS ON FILE WITH APPLICABLE AGENCIES

In ***Roberts v. Secretary of Labor***, No.01-3681 (6th Cir. Jan. 24, 2002) (unpublished decision available at 2002 WL 104791) (case below ARB No. 00-015, ALJ No. 1996-ERA-24), the Sixth Circuit affirmed the ARB's determination that Complainant's complaint was not timely filed as supported by substantial evidence.

The Sixth Circuit had earlier remanded the case to determine the nature of a letter Complainant had submitted to the court allegedly showing a timely filing in the matter. The court ordered the remand because it found the ARB's earlier decision in the matter was not supported by substantial evidence because the ARB had made characterizations about the letter even though it was not part of the record before DOL at the time.

On remand, the presiding ALJ conducted a hearing on whether a complaint had been timely filed, and concluded that it had not. *Roberts v. Battelle Memorial Institute*, 1996-ERA-24 (ALJ Nov. 23, 1999). The ARB affirmed this finding. *Roberts v. Battelle Memorial Institute*, ARB No. 00-015, ALJ No. 1996-ERA-24 (ARB Apr. 30, 2001).

The Sixth Circuit found that substantial evidence supported the conclusion that Complainant never mailed the letter that allegedly constituted a timely ERA whistleblower complaint. The Court noted that Complainant had first produced the letter before it in 1997 despite knowing that timeliness was an issue in the prior administrative proceedings. Second, the Court noted that neither OFCCP nor EEOC had a copy of the letter in its files. Third, the Court noted that DOL had forwarded a complaint form to EEOC of the same date as the purported letter. This complaint form was a EO 11246 complaint that did not deal with retaliatory discharge. Finally, Complainant received a letter from EEOC; however it acknowledged Complainant EO 11246 complaint, and not a filing with DOE alleging retaliation under the ERA as Complainant alleged.

IV. Equitable tolling of filing period

[Nuclear & Environmental Whistleblower Digest IV C 9]
EQUITABLE TOLLING

In ***Day v. Oak Ridge Operations, U.S. Dept. of Energy***, 1999-CAA-23 (ALJ Dec. 31, 2001), the ALJ recommended dismissal for lack of a timely filing of the complaint although Complainant asserted that equitable tolling should apply. The ALJ found that it was uncontested that Complainant was disabled due to mental incapacity during the period that he could have made a timely environmental whistleblower complaint. Nonetheless, there was no evidence that Complainant had been adjudicated as incompetent or institutionalized, and Complainant had been well enough to contact his attorney two days after he received a termination letter from Respondent, and told the attorney that he was fired and wanted to pursue whatever legal actions he had. Moreover, the attorney had indicated that he would take care of everything.

V. OSHA/Wage and Hour Division investigation

[Nuclear & Environmental Whistleblower Digest V C 1]
REMAND TO OSHA BASED ON ALLEGATION OF INADEQUACIES IN INVESTIGATION

In ***Turpin v. Lockheed Martin Corp.***, 2001-ERA-37 (ALJ Aug. 28, 2001), Complainant requested a remand to OSHA for further investigation based on the allegation that OSHA failed to fully investigate the merits of his complaint and assigned the case to a biased investigator. The Associate Chief ALJ denied the motion based on *Billings v. Tennessee Valley Authority*, 1991-ERA-12 (ARB June 26, 1996), in which the Board had held that "any arguable flaws in the ... investigation or findings would not adversely affect litigation of his case before the ALJ." The case was subsequently assigned to a presiding ALJ, and Complainant renewed his motion for remand. The presiding ALJ, however, agreed with the Associate Chief ALJ's earlier ruling. ***Turpin v. Lockheed Martin Corp.***, 2001-ERA-37 (ALJ Oct. 15, 2001).

VI. Request for hearing

[Nuclear & Environmental Whistleblower Digest VI B]
REQUEST FOR HEARING; JURISDICTIONAL REQUIREMENT THAT COPY BE SERVED ON OPPOSING PARTY

In ***Cruver v. Burns International***, 2001-ERA-31 (ALJ Dec. 5, 2001), the ALJ dismissed the complaint filed by Complainant and ordered the decision rendered by OSHA to be the final order of the Secretary in the matter, where although Complainant timely filed a request for a hearing with the Chief ALJ, failed to ever serve a copy of the request on Respondent as required by 29 C.F.R. § 24.4(d)(2)(ii). Although the case had been scheduled for hearing, and the parties for several months had engaged in discovery, and Respondent did not allege that the failure to serve a copy of the hearing request on it caused it prejudice, the ALJ found that the regulation at issue was not merely directive, but jurisdictional, citing *Webb v. Numanco, LLC*, 1998-ERA-27 and 28 (ALJ July 17, 1998).

VII. Proceedings before OALJ

[Nuclear & Environmental Whistleblower Digest VII A 2]
DISCOVERY; PRIOR DISCRIMINATION CLAIMS BY COMPLAINANT

In ***Backen v. Nuclear Management Co.***, LLC, 2001-ERA-25 (ALJ Sept. 18, 2001), Respondent sought to compel production from Complainant of:

> Any and all documents relating or referring to prior discrimination claims filed by you concerning claims of discrimination, retaliation, and/or harassment, including any and all documents prepared for, sent to, or received from the Department of Labor and/or the Nuclear Regulatory Commission relating to prior discrimination claims filed by you.

The ALJ denied the motion to the extent that materials, such as prior final decisions and orders involving the Claimant were publically available on the OALJ website. In regard to documents not publically available, the ALJ found that Respondent's discovery request was "overbroad, unduly burdensome, and not reasonable calculated to produce relevant materials." The ALJ observed that:

> Presumably in their request, the Employer is seeking evidence which would demonstrate a retaliatory motive by the Complainant against the Employer. I fail to see how documents relating to other employers, individuals, and incidents outside of the control of the Employer in the present case would show retaliation by the Complainant against Nuclear Management Corporation. Furthermore, I find that granting this motion would be against the public policy underlying whistleblower protection statutes which is to encourage individuals to report violations by employers.

[Nuclear & Environmental Whistleblower Digest VII A 6]
DISCOVERY; PRODUCTION OF OIG INVESTIGATIVE MANUAL

In ***Erickson v. U.S. Environmental Protection Agency***, 1999-CAA-2 (ALJ Feb. 14, 2002), the ALJ granted Complainant's motion for the production of the EPA OIG Investigative Manual where she presented a declaration establishing that the manual would be highly probative -- going to the heart of Complainant's case of harassment, of adverse working conditions, and hostile working environment.

[Nuclear & Environmental Whistleblower Digest VII A 6]
DISCOVERY; DESTRUCTION OF E-MAIL BACKUP TAPES AFTER COMPLETION OF DISCOVERY

In ***Erickson v. U.S. Environmental Protection Agency***, 1999-CAA-2 (ALJ Feb. 19, 2002), Complainant' moved for default judgment on the ground of spoilation of evidence. Complainant

presented exhibits indicating that Respondent had destroyed back up tapes of e-mails, and alleged that this destruction was intentional "in light of Complainant's request that the E-mail back-up tapes be searched and the concerns of the Court and Congress regarding back-up E-mail tapes." The ALJ denied the motion because discovery had ended two weeks prior to the date of destruction of the tapes, prior to that time Respondent had asserted that they had searched their E-mail tapes pursuant to Complainant's discovery request and had found nothing, Complainant had not hired her own expert to inspect the tapes, and "Complainant had not demonstrated that the destroyed E-mail tapes were related to the pending litigation as Complainant presented no evidence on the contents of the destroyed tapes."

[Nuclear & Environmental Whistleblower Digest VII B 1]
SUBPOENAS; ENFORCEMENT AGAINST THIRD-PARTY FEDERAL EMPLOYEE

In ***Bobreski v. District of Columbia Water & Sewer Authority***, 2001-CAA-6 (ALJ Mar. 1, 2002), Respondent's counsel sent a letter to EPA requesting the testimony of an EPA investigator in the instant environmental whistleblower case, and when EPA declined, served a subpoena on the investigator. EPA responded to the subpoena and stated that the investigator would not be able to testify because his testimony would not be in the best interest of the EPA. However, the Regional Counsel for the EPA requested that the investigator execute an affidavit in order to prevent confusion and provide an official record of the inspection. Sometime thereafter, Complainant's counsel contacted the EPA regarding the affidavit and on December 12, 2001, Complainant's counsel and the investigator held a conference call. Complainant's counsel later requested that the investigator memorialize their conversation in an affidavit. In addition to Complainant's counsel's affidavit request, the investigator was served a subpoena. EPA thereafter issued a second determination stating that the investigator would not be able to testify because his testimony would not be in the best interest of the EPA and would divert him from his official duties. The EPA did not file a motion to quash the subpoenas.

Complainant's counsel then filed with the presiding ALJ a motion to order the investigator's testimony invoking Fed. R. Civ. Pro. 45, and arguing that EPA showed partiality in providing an affidavit to Respondent. In response, EPA asserted that it did not show partiality to the Respondent, which was not consulted in the wording of the affidavit; that it has the authority to restrict its employees from complying with a subpoena pursuant to 40 CFR § 2.402(b); and that the investigator's testimony is not in the best interest of the EPA. Respondent's counsel responded, stating that it could not join in Complainant's motion because OALJ has no express authority to issue subpoenas in whistleblower cases, nor does it have the authority to enforce the subpoena.

The ALJ found that she had the authority to issue subpoenas pursuant to *Childers v. Carolina Power & Light Co.*, ARB No. 98-077, ALJ No. 97-ERA-32 (ARB Dec. 29, 2000), but not the authority to enforce such subpoenas. The ALJ wrote:

> I conclude that Rule 45 does not apply, and as the law has developed thus far, an ALJ does not have the authority to enforce an administrative subpoena. Any

agency that concludes contempt sanctions are necessary to compel the appearance of a witness or production of documents must petition for enforcement of its subpoena in the appropriate district court. *See* 5 U.S.C. § 555(d); *Childers* at 12; 29 CFR § 18.29(b). The rules governing hearings before the OALJ provide that the Federal Rules of Civil Procedure "shall be applied in any situation not provided for or controlled by these rules," 29 CFR § 18.1. Two OALJ rules provide for enforcing subpoenas. 29 CFR § 18.24(d), quoted above, authorizes the party adversely affected by failure to comply with a subpoena "where authorized by statute or by law" to apply to a district court for enforcement of the subpoena. 29 CFR § 18.28(b) contains a similar provision for ALJ's:

> If any person in proceedings before an adjudication officer . . . refuses to appear after having been subpoenaed . . . the administrative law judge responsible for the adjudication, where authorized by statute or law, may certify the facts to the Federal District Court having jurisdiction in the place in which he or she is sitting to request appropriate remedies.

Because the OALJ rules specifically provide for enforcement of subpoenas by a court upon application by a party or certification by an ALJ, those rules, rather than Fed. R. Civ. Pro. 45, govern enforcement of the subpoena to Mr. Shabazz. Because the authority to enforce the subpoena lies with the district court, the question of whether the EPA has the ability to prohibit its employee from complying with the subpoena is not properly before me, but may be raised with the appropriate district court in an enforcement action. If the Complainant still wishes to seek enforcement of the subpoena, he should apply to the U.S. District Court for the District of Columbia.

[Nuclear & Environmental Whistleblower Digest VII C 1]

SUMMARY DECISION; LACK OF EVIDENCE OF PRETEXT NOT APPROPRIATE GROUND

In ***Turpin v. Lockheed Martin Corp.***, 2001-ERA-37 (ALJ Mar. 8, 2002), the ALJ denied Respondents' motion for summary judgment on the ground that Complainant had presented no evidence that the reason proffered for the adverse employment action was pretextual. The ALJ, citing *Hobby v. Georgia Power Co.*, 1990-ERA-30 (Sec'y Aug. 4, 1995), denied the motion, finding that Respondents' motion had confused the evidence necessary to establish a *prima facie* case with the evidence necessary to establish the ultimate question of employment discrimination. The ALJ found that Respondents' proffered reasons for the adverse employment action and whether they were pretextual were not relevant in a motion for summary judgment prior to hearing where Complainant had established a *prima facie* case based on temporal proximity of the protected conduct and the adverse employment action.

VIII. Powers, responsibilities and jurisdiction of ALJ, Secretary and federal courts

[Nuclear & Environmental Whistleblower Digest VIII B 3]
INTERLOCUTORY APPEALS DISFAVORED

In ***Rockefeller v. U.S. Dept. of Energy***, ARB No. 02-051, ALJ No. 2002-CAA-5 (ARB Feb. 28, 2002), the ARB dismissed Complainant's appeal of the ALJ's order of remand as a disfavored interlocutory appeal.

Similarly, in ***Dempsey v. Fluor Daniel, Inc.***, ARB No. 01-075, ALJ No. 2001-CAA-5 (ARB Feb. 20, 2002), the ARB issued an order to show cause why Respondent's petition for review should not be dismissed as interlocutory where it became apparent upon the filing of opening and reply briefs that the ALJ's Recommended Decision and Order did not dispose of the case on the merits but only decided the initial issue of whether Complainant was a covered employee.

IX. Miscellaneous procedural issues

[Nuclear & Environmental Whistleblower Digest IX E]
REMAND TO OSHA TO INVESTIGATE ALLEGATIONS IN AMENDMENT OF COMPLAINT; JUDICIAL EFFICIENCY

In ***Backen v. Nuclear Management Co., LLC***, 2001-ERA-25 (ALJ Sept. 18, 2001), Complainant amended his complaint to allege a new instance of retaliation by Respondent (termination from employment), and Respondent moved for a remand to OSHA to investigate, arguing that ERA, 42 U.S.C. §5851, requires OSHA to investigate every complaint under the ERA, and that until there is such an investigation OALJ lacks jurisdiction to adjudicate this claim on the merits. Respondent also argued that "bypassing an OSHA investigation would undermine fundamental policy objectives underlying the ERA's procedural scheme." The ALJ denied the motion, finding that it would be "more expeditious and in the interest of judicial economy to handle the supplemental allegations in the same proceeding." In regard to Respondent's argument about policy, the ALJ wrote:

> While the Employer argues that an OSHA investigator facilitates the goals of achieving settlements, weeding out frivolous complaints, and collecting objective evidence, nothing exists at the hearing level which deters those objectives. In fact, procedures exist at the Office of Administrative Law Judges level which encourages those various purposes. The statute and regulations also promote the goals of judicial economy, efficiency, cost and practicality, all of which I find will be best served by not remanding this proceeding.

Compare ***Freeze v. Consolidated Freight, Inc.***, 2002-STA-4 (ALJ Feb. 5, 2002) (ALJ remanded case to OSHA "for the purpose of Complainants' filing with said office, on or before sixty (60) days hereof, an amended complaint (to include allegations of acts of discrimination occurring within a

period of timeliness for complaint filing under the Act) for processing and determination of merits thereof by such office." ALJ ordered that he would retain jurisdiction over this matter upon the return of such remand.); ***Rockefeller v. U.S. Dept. of Energy***, 2002-CAA-5 (ALJ Feb. 7, 2002) (ALJ granted remand requested by Complainant, and not opposed by Respondent, on new issue that had not been adequately developed).

[Nuclear & Environmental Whistleblower Digest IX K]
STATE SOVEREIGN IMMUNITY; STAY OF ADMINISTRATIVE PROCEEDINGS

In ***Ewald v. Commonwealth of Virginia Dept. of Waste Management***, ARB No. 02-027, ALJ No. 1989-SDW-1 (ARB Jan. 31, 2002), the ARB granted the OSHA Assistant Secretary's suggestion to stay briefing on the ground that the U.S. Supreme Court has pending before it in *South Carolina State Ports Authority v. Federal Maritime Comm'n*, 243 F.3d 165 (4th Cir. 2001), *petition for cert. granted*, 70 U.S.L.W. 3279 (U.S. Oct. 15, 2001) (No. 01-46) – a case the ALJ relied upon in concluding that state sovereign immunity barred DOL administrative-adjudication under the employee protection provisions of the CERCLA, FWPCA, SDWA and the SWDA. Briefing the instant case under the ARB's original schedule, the Assistant Secretary argued, would not be beneficial given that the Supreme Court's decision in *South Carolina Ports* is likely to affect the disposition.

To the same effect ***Geraci v. Texas Natural Resources Conservation Commission***, 2002-WPC-1 (ALJ Dec. 18, 2001).

But see ***Duncan v. Sacramento Metropolitan Air Quality Management District***, 2001-CAA-15 (ALJ Feb. 4, 2002) (declining to consider Respondent's Eleventh Amendment defense, finding that an administrative court is not the proper forum to raise such constitutional concerns).

Editor's note: The ALJ decision in ***Ewald v. Commonwealth of Virginia Dept. of Waste Management***, 1989-SDW-1 (ALJ Dec. 5, 2001), contains a thoughtful analysis of the Eleventh Amendment issue as it pertains to DOL adjudications of CERCLA whistleblower cases, and should be reviewed by those interested in the issue. In an interesting postscript, the ALJ noted that OSHA might choose to participate in the case, and that such participation would permit the ARB to consider the effect, if any, such participation would have on the Commonwealth's sovereign immunity.

[Nuclear & Environmental Whistleblower Digest IX M 2]
DISQUALIFICATION OF COUNSEL

In ***Turpin v. Lockheed Martin Corp.***, 2001-ERA-37 (ALJ Nov. 29, 2001), Complainant charged both Lockheed Martin - a former contractor -- and BWXT -- the successor contractor of the DOE facility where Complainant was formerly employed -- with unlawful discrimination under the ERA whistleblower provision. The ALJ denied Complainant's motion to disqualify Respondents' counsel where Complainant failed to provide a basis for the allegation that there was an impropriety in a law firm and the general counsel of the successor contractor from representing both respondents. The

ALJ observed that "[t]he courts have held that disqualification of counsel is a drastic measure which should be used only when absolutely necessary. Disqualification is only permissible when a specific identifiable impropriety has occurred. *Freeman v. Chicago Musical Instrument Co.*, 689 F. 2d 715, 721 (6th Cir. 1982), *Panduit Corp v. All States Plastic Mfg. Co.*, 744 F. 2d 1564, 1576 (7th Cir. 1984)."

[Nuclear & Environmental Whistleblower Digest IX M 2]

COUNSEL AS WITNESS; PRIVILEGED STATEMENTS DURING LITIGATION CANNOT CONSTITUTE GROUNDS FOR DISQUALIFICATION OF COUNSEL AS POTENTIAL WITNESS

In ***Erickson v. U.S. Environmental Protection Agency***, 1999-CAA-2 (ALJ Jan. 24, 2002), the ALJ was conducting a prehearing conference with counsel during which a complaint was lodged by Complainant's counsel alleging that Respondent had engaged in document theft. Respondent's counsel denied the possibility of document theft, and stated in reference to the Complainant "that's their paranoia surfacing." Counsel for Complainant asked for an apology, but Respondent's counsel declined. Thereafter, Complainant filed a motion to disqualify Respondent's counsel on the theory that the "paranoia" statement was blacklisting, and she would now be a witness for Complainant in the pending litigation. Later Complainant renewed the motion and sought disqualification of Respondent's entire legal department. In turn, Respondent moved to bar Complainant's counsel under 29 C.F.R. § 18.36 alleging that he had failed to adhere to reasonable standards of conduct before the ALJ.

The ALJ wrote:

> Attorney disqualification motions are governed by national ethical standards adopted by the court including, but not limited to: that American Bar Association's (ABA) Model Rules of Professional Conduct, and the ABA's Code of Professional Responsibility. *Horaist v. Doctor's Hospital of Opelousas*, 255 F.3d 261, 266 (5th Cir. 2001). The ABA Code was "not designed to permit a lawyer to call opposing counsel as a witness and thereby disqualify him as counsel." ABA Code, Cannon 5, n.31; *Kroungold v. Triester*, 521 F.2d 763, 766 (3rd Cir. 1975). Because of the potential for abuse, disqualification motions should be subject to "particularly strict judicial scrutiny." *Rice v. Baron*, 456 F. Supp. 1361, 1370 (S.D. N.Y. 1978).
>
> * * *
>
> Ms. Smith's statements, made in a pre-trial conference, enjoy a degree of privilege as they are part of the litigation process, and it is not proper to use statements made before the judge as the basis for a complaint of blacklisting. . . . Privileged statements cannot provide the basis for an overt act of blacklisting.. . .
>
> Here, I find that Ms. Smith's statements of concerning her opinion that

> Complainant was "paranoid" and her refusal to apologize for the comment were made in the privileged context of a pre-hearing conference and I find the remarks insufficient to justify a motion to disqualify Ms. Smith on the grounds that she is a necessary witness in a blacklisting complaint. This is clearly not a case where in-house counsel is responsible for investigating an employee's complaint where the results of the investigation from the basis of subsequent litigation. Rather, I find that Complainant's Motion to Disqualify is undertaken more for the purpose of gamesmanship in direct violation of the purpose of the ABA Code. ...

HTML @ 2 - 3. The ALJ found Complainant counsel's behavior to be "inappropriate" but declined to disqualify him under 29 C.F.R. § 18.36, although the ALJ cautioned him against such behavior in the future.

Compare ***Rockefeller v. U.S. Dept. of Energy***, 2002-CAA-5 (ALJ Feb. 7, 2002) (ALJ remanded case for further development by OSHA where, *inter alia*, Complainant's counsel in proposed stipulations alleged that Respondent's counsel had made blacklisting remarks and named her as a witness. ALJ found that parties failed to brief the issue adequately).

XI. Burden of proof and production
A. Prima facie case

[Nuclear & Environmental Whistleblower Digest XI A 1]
BURDEN OF PROOF AND PRODUCTION; *MCDONNELL DOUGLAS* GUIDELINES APPLIED TO PRE-1992 ERA AMENDMENTS CASE

In ***Doyle v. U.S. Secretary of Labor***, No. 00-1589 and 00-2035 (3rd Cir. Mar. 27, 2002), the Third Circuit found it proper to apply the burden shifting guidelines set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817 (1973), to an ERA whistleblower case that arose under the ERA as it existed prior to the its amendment in1992

XI. Burden of proof and production
C. Pretext

[Nuclear & Environmental Whistleblower Digest XI C 2 b]
PRETEXT; RELEASE FROM LIABILITY FOR BACKGROUND CHECK NOT SHOWN TO BE PRETEXTUAL

In ***Doyle v. U.S. Secretary of Labor***, No. 00-1589 and 00-2035 (3rd Cir. Mar. 27, 2002), the Third Circuit reversed a decision of the Secretary of Labor that Respondent's insistence that Complainant sign a release (relating to its gathering of information for a routine screening of applicants for positions at nuclear power plants) as a condition for employment was unlawful under the ERA employee protection provision. The court held that Complainant had not made out even a *prima facie* case because the release was merely addressed to limiting liability for the invasion of privacy,

and said nothing about waiving liability for illegal blacklisting. The court held that even if the release could be construed to include a waiver of the right to file a complaint for illegal blacklisting, it was error for the Secretary to so construe an ambiguous document in this way. The court also noted that the issue was one of construction of a proposed contract and not construction of a statute.

As an independent reason for reversing the Secretary's finding, the court held that Complainant had not offered substantial evidence to support a conclusion that Respondent's proffered legitimate reasons for refusing to hire the Complainant without signing the release – to ensure power plant integrity and compliance with regulatory requirements by hiring only carefully screened temporary employees – were pretextual. There was no evidence that Employer's benign explanation was contrived to obscure a genuine discriminatory motive. The court rejected Complainant's argument that the authorization itself permitted an inference of discriminatory intent because, the court found, the document was facially neutral.

One member of the court's panel dissented, finding that the majority erred in characterizing the case of one of contract law rather than statutory interpretation. The dissenter would have held that the Secretary properly gave a broad construction of the ERA whistleblower provision in finding that employees must not be compelled to sign what they believe to be a waiver of past and future ERA claims as a condition of employment. The dissenter would have found that the fact that such a contract term would have been unenforceable was immaterial because an ordinary reader would not know that the waiver could not be used as a defense to a retaliation claim. The dissenter observed that the release's language was quite sweeping in its terminology.

XII. Protected activity

[Nuclear & Environmental Whistleblower Digest XII D 6]

PROTECTED ACTIVITY; EXPOSURE OF IMPOSSIBILITY OF PERFORMANCE OF SUPERFUND CLEAN-UP PROJECT SUFFICIENT EVIDENCE OF PROTECTED ACTIVITY TO WITHSTAND MOTION FOR SUMMARY JUDGMENT

In ***Erickson v. U.S. Environmental Protection Agency***, 1999-CAA-2 (ALJ Feb. 13, 2002), the ALJ found that there was more than a scintilla of evidence demonstrating that Complainant's actions prior to filing her first complaint in 1998 constituted protected activity making a grant of summary decision on this issue inappropriate. Specifically, the ALJ found that "complainant alleged that her actions prior to filing her first complaint in 1998, related to problems with EPA regulations and analytical methods that resulted in waste and impossibility of performance issues with regards to Superfund clean-up projects. As a result of such regulations and analytical procedures, Superfund clean-up sites would not undergo bio-remediation to the required standards. Complainant's actions led to contract reformation in 1993 and led to a restructuring of contractual language in 1995."

XIII. Adverse action

[Nuclear & Environmental Whistleblower Digest XIII B 1]
ADVERSE ACTION; REQUIREMENT OF RELEASE OF LIABILITY FOR BACKGROUND CHECK OF JOB APPLICANTS

See ***Doyle v. U.S. Secretary of Labor***, No. 00-1589 and 00-2035 (3rd Cir. Mar. 27, 2002), casenoted above under Digest XI C 2 b.

XVII. Settlements

[Nuclear & Environmental Whistleblower Digest XVII G 4]
SETTLEMENT AGREEMENT; OALJ IS WRONG FORUM FOR ENFORCEMENT

In ***Munz v. Sacramento Metropolitan Air Quality Management District***, 2002-CAA-9 (ALJ Mar. 22, 2002), the ALJ dismissed Complainant's request to reopen Case No. 1997-CAA-12 on the ground that Respondent allegedly breached the settlement agreement reached in the earlier action. The ALJ found that Complainant had filed his request for enforcement in the wrong forum. *See Thompson v. Houston Lighting & Power Co.*, ARB No. 98-101, ALJ No. 1996-ERA-34 (ARB Mar. 30, 2001), citing *Williams v. Metzler*, 132 F.3d 937 (3d Cir. 1997) (indicating that ERA enforcement actions must be filed in federal district court).

See also ***Howick v. Experience Hendrix, LLC***, 2000-STA-32 (ALJ Feb. 8, 2002) (ALJ declined to impose sanctions against Complainant for failure to comply with settlement agreed upon in open court where Complainant subsequently opposed the enforcement of the settlement based on a claim of duress).

XVIII. Dismissals

[Nuclear & Environmental Whistleblower Digest XVIII C 5]
FAILURE TO FILE OPENING BRIEF; FAILURE TO PROSECUTE BEFORE ARB MAY RESULT IN DISMISSAL IN ERA CASE, BUT MERITS ARE STILL REVIEWED IN STAA CASE

In ***Reid v. Niagara Mohawk Power Corp.***, ARB No. 01-083, ALJ No. 2001-ERA-26 (ARB Dec. 10, 2001), Complainant had been given three extensions of time to file an opening brief as directed by the ARB. In the third extension, the ARB had cautioned Complainant that, barring extraordinary circumstances, the Board would grant no further enlargements. On the final day for filing the opening brief under the third extension, Complainant faxed to the Board a request for a further sixty-day enlargement of time, stating that his Employer had taken disciplinary action against him, which had made it difficult for his family and himself. The ARB found Complainant had not shown why his employer having taken disciplinary action against him precluded him from timely filing his opening brief, and therefore, failed to demonstrate exceptional circumstances in support of his

request for a fourth extension of time. The Board then dismissed the appeal, stating:

> Furthermore, the Board has the inherent power to dismiss a case if a petitioning party fails to submit an opening brief as provided in the Board's briefing order. *Solnicka v. Washington Public Power Supply System*, ARB No. 00-009, ALJ No. 99-ERA-19, slip op. at 3 (ARB Apr. 25, 2000). *Accord Link v. Wabash Railroad Co.*, 370 U.S. 626, 630 (1962) (recognizing that courts have the inherent power to dismiss a case for failure to prosecute). Like the courts, this Board must necessarily manage its docket in an effort to "achieve the orderly and expeditious disposition of cases." *Id*. at 631. Thus, given Reid's failure to submit an opening brief as ordered, we find that Reid has failed to prosecute his case. Accordingly, we DISMISS Reid's appeal.

Complainant thereafter filed a fifth request for additional time to file a brief. In *Reid v. Niagara Mohawk Power Corp.*, ARB No. 01-083, ALJ No. 2001-ERA-26 (ARB Jan. 28, 2002), the ARB returned the pleading to Complainant and informed him that if he disagreed with the Board's decision, the next step would be to file an appeal in the appropriate United States Court of Appeals as provided in 42 U.S.C. §5851(c) (1995).

In an STAA case, ***Tucker v. Connecticut Winpump Co.***, ARB 02-005, ALJ No. 2001-STA-53 (ARB Mar. 15, 2002), the ARB handled the failure to file a timely opening brief in a different manner. In *Tucker*, Complainant failed to file a timely brief, but over a month after the due date filed a request for a continuance due to an physical injury he had received several months earlier. The ARB ordered him to show cause why the enlargement of time should not be denied because it was not clear why the physical injury prevented the filing of a timely brief. Complainant failed to respond to the order to show cause, and the ARB consequently denied the motion for additional time. Rather than dismissing the case as in *Reid*, however, the Board went on to review the ALJ's recommended decision and order on its merits. This is because the STAA regulations at 29 C.F.R. § 1978.109(a) and § 1978.109(c) contemplate an automatic review by the ARB and the issuance of the final order by the ARB. Thus, the ARB concluded that in an STAA case, the ARB will review the record and issue the final order, even if the parties choose not to file briefs.

XX. Relationship between 29 C.F.R. Part 24 and other laws

[Nuclear & Environmental Whistleblower Digest XX A]
CONSTITUTIONAL ISSUES; AUTHORITY OF ALJ TO RULE ON

In ***Ewald v. Commonwealth of Virginia Dept. of Waste Management***, 1989-SDW-1 (ALJ Dec. 5, 2001), the ALJ had before him the issue of whether the complaint should be dismissed under the Eleventh Amendment. Preliminary to discussion of sovereign immunity, the ALJ addressed whether an ALJ can rule on constitutional issues. He wrote:

> It has also been suggested that constitutional issues, generally, and sovereign

immunity issues in particular, should not be addressed in the context of an administrative proceeding, and I am mindful of those arguments. The Administrative Law Judge in Jayco v. Ohio, for example, concluded that he lacked authority to consider the sovereign immunity issue, (*See, e.g.* ALJ D&O at 61), and the District Court seemed to agree even while concluding that the two-week administrative trial which resulted was unconstitutional. (*See*, Ohio, *supra* at 12,18). Yet, the constitutionality of CERCLA is not in issue in these proceedings.

It is, of course, a well established principle of administrative jurisprudence that non-Article III judicial officers must avoid adjudicating the constitutionality of federal statutes or certain constitutional claims, (*See*, Ohio, *supra* at 12, citing Commodity Futures Trading Commission v. Schor, 478 U.S.833 (1986)) (Commission jurisdiction to adjudicate common law counterclaim), but I am unaware of any authority which precludes an ALJ from applying constitutional principles in an administrative proceeding, (*See*, OFCCP v. The Boeing Co., 1999 OFC 14 (ALJ, Aug. 16, 1999)), during the trial, or when rendering a final decision. *See*, Nationsbank v. Herman, 174 F.3d 424 (4th Cir. 1999), *dec. on remand*, OFCCP v. Nationsbank, 1997 OFC 16, ALJ Aug. 25, 2000. Indeed, in circumstances virtually indistinguishable from this matter, the Fourth Circuit in South Carolina State Ports, specifically noting that the ALJ had "dismissed the suit on sovereign immunity grounds," reversed the Federal Maritime Commission which had reversed the Administrative Law Judge. South Carolina State Ports, *supra* at 3.

In this instance, Ewald acknowledges that CERCLA is a commerce power enactment, (*See*, Hearing, March 20, 2001, Tr. 16.), and agrees that it can not abrogate a state's sovereign immunity. Precedent supports her concession. Although the Supreme Court has yet to review a state's sovereign immunity defense in the context of CERCLA's whistleblower provisions, it has twice reviewed CERCLA's limited and specific abrogation of sovereign immunity in Section 107, and ultimately found it inconsistent with the Eleventh Amendment. (Pennsylvania v. Union Gas Co., 491 U.S. 3 (1989), *overruled*, Seminole Tribes of Florida v. Florida, 517 U.S. 44, 72-73,(1996); *see*, fn. 11 *infra*). Clearly, then, CERCLA would not abrogate the sovereign immunity of an unwilling state, but Complainant argues forcefully that Eleventh Amendment jurisprudence would not preclude a waiver of sovereign immunity in the context of a commerce power statute under circumstances in which Congress conditioned a grant of federal funds upon the sovereign recipients agreement to submit to private suits. She believes such a waiver accompanied Virginia's participation in the Superfund Program, and she was afforded a full opportunity to pursue discovery and research which might substantiate her argument.

Consequently, while Constitutional principles apply to the questions raised in this proceeding, the validity of the whistleblower provisions of the Act is not in question.11 The issues are whether CERCLA embodies a clear legislative intent to

> condition the grant of federal funds on a waiver of sovereign immunity, and whether the state, seeking to secure the federal funds, unequivocally acquiesced in the waiver. The authorities suggest that it would not constitute an unwarranted administrative intrusion to consider the sovereign immunity waiver issues under such circumstances. To the contrary, consideration of the issue may be unavoidable in the context of the Fourth Circuit's decision in South Carolina State Ports and ARB jurisprudence which casts the sovereign immunity issue as "jurisdictional in nature." (Pastor v. Veterans Affairs Medical Center, 99 ERA 11(ARB Ord. March 1, 2001).

HTML @ 5-6 (footnotes omitted).

But see Duncan v. Sacramento Metropolitan Air Quality Management District, 2001-CAA-15 (ALJ Feb. 4, 2002) (declining to consider Respondent's Eleventh Amendment defense, finding that an administrative court is not the proper forum to raise such constitutional concerns).

[Nuclear & Environmental Whistleblower Digest XX E]
SOVEREIGN IMMUNITY; NRC AND NRC OFFICIALS

In ***Bath v. U.S. Nuclear Regulatory Commission***, 2001-ERA-41 (ALJ Jan. 18, 2002), the ALJ recommended dismissal of the complaint against the NRC on the ground that the NRC was entitled to sovereign immunity from complaints arising under the whistleblower provision of the ERA. Similarly, the ALJ recommended dismissal of the complaint on grounds of sovereign immunity against individual employees of the NRC where the allegation was retaliatory conduct of the part of these officials within the scope of their employment.

[Nuclear & Environmental Whistleblower Digest XXE]
STATE SOVEREIGN IMMUNITY; STAY OF ADMINISTRATIVE PROCEEDINGS

See also ***Ewald v. Commonwealth of Virginia Dept. of Waste Management***, ARB No. 02-027, ALJ No. 1989-SDW-1 (ARB Jan. 31, 2002), and related cases casenoted at Digest IX K above.

II. Procedure

[STAA Whistleblower Digest II E 5]
PREMATURE APPEAL; AUTHORITY OF ARB TO CONDUCT PEER REVIEW OR DIRECT ASSIGNMENT OF PARTICULAR ALJ

In ***Somerson v. Mail Contractors of America***, ARB No. 02-052, ALJ Nos. 2002-STA-18 and 19 (ARB Mar. 18, 2002), the ALJ terminated the hearing and ordered Complainant escorted from the courtroom upon a finding that Complainant had, *inter alia*, disrupted the conduct of the formal hearing. Complainant thereafter filed, by fax, a motion for "peer review" of the presiding ALJ, a new hearing, and selection of an ALJ to hear the case. The ARB docketed the motion as an appeal, but upon further review, dismissed the appeal because the ALJ had not yet issued a decision and order in the case. The ARB also observed that it does not have jurisdiction to conduct a "peer review" of an ALJ or to select any particular ALJ to hear a STAA case.

The ALJ subsequently issued a recommended decision and the ARB docketed it for automatic review pursuant to 29 C.F.R. § 1978.109(a).

IV. Burden of proof and production
B. Articulation of nondiscriminatory reason for adverse action

[STAA Whistleblower Digest IV B 2 c]
CAUSATION; PROBLEMS DUE TO PATTERN OF PROBLEM BEHAVIOR AND NOT PROTECTED ACTIVITY

In ***Forrest v. Transwood Logistics, Inc.***, ARB No. 01-090, ALJ No. 2001-STA-43 (ARB Jan. 25, 2002), the ARB affirmed the ALJ's holding that although Complainant engaged in protected activity when he refused to drive a truck in excess of the hours permitted by regulation, there was no unlawful discrimination where the dispatcher's failure to afford Complainant an eight hour break was the result of a simple miscalculation, and once the dispatcher realized her error, she immediately apologized and allowed Complainant to take an eight-hour break. The ARB also affirmed the ALJ's findings that, to the extent that Complainant was having difficulty working for Employer, his problems were due to an on-going pattern of problem behavior and were not occasioned by this protected activity, and that none of Complainant's jobsite conflicts rose to the level of aggravation that would support a finding of constructive discharge.

V. Protected activity

[STAA Whistleblower Digest V A 3]
HIGHWAY USE TAX STICKER AS IMPLICATING SAFETY; ARB DOES NOT REACH ISSUE

In ***Forrest v. Transwood Logistics, Inc.***, 2001-STA-43 (ALJ Aug. 7, 2001), the ALJ had found that the absence of a New York Highway Use Tax on Complainant's assigned truck sticker was a tax matter and not related to safety. On review, the ARB did not reach this issue as it affirmed the ALJ on other grounds. ***Forrest v. Transwood Logistics, Inc.***, ARB No. 01-090, ALJ No. 2001-STA-43 (ARB Jan. 25, 2002).

[STAA Whistleblower Digest V B 2 a]
CALLING IN SICK; EMPLOYER'S SPONTANEOUS FIRING IN PART FOR THAT REASON VIOLATES STAA

In ***Drew v. Alpine, Inc.***, 2001-STA-47 (ALJ Jan. 28, 2002), the ALJ found that Respondent violated the STAA employee protection provision when Respondent's vice president fired Complainant "spontaneously" as she was speaking to Complainant's wife because she did not believe that Complainant was really sick and because she was annoyed that she was disturbed late at night at home. The ALJ found that employers may legitimately require proof of illness, but in the instant case the vice-president had neither requested proof of illness nor even questioned Complainant's wife on the extent of the illness (which in fact was verified in the record by evidence of a hospital visit). The ALJ also rejected Respondent's attempt to paint Complainant as a generally unreliable employee, finding the more credible evidence of record that Complainant in fact had been considered a very reliable employee.

VI. Adverse action

[STAA Whistleblower Digest VI A]
ADVERSE ACTION FOUND NOT PRESENT WHERE DISPATCHER APOLOGIZED AND PERMITTED COMPLAINANT TO TAKE A REST BREAK

See ***Forrest v. Transwood Logistics, Inc.***, ARB No. 01-090, ALJ No. 2001-STA-43 (ARB Jan. 25, 2002), casenoted under Digest IV B 2 c.

X. Settlements

[STAA Whistleblower Digest X A 2]
SETTLEMENT; ORAL ACCEPTANCE AT HEARING; VOIDABILITY FOR DURESS

In ***Howick v. Experience Hendrix, LLC***, 2000-STA-32 (ALJ Feb. 8, 2002), the ALJ approved a settlement and dismissed the case with prejudice where the parties had represented that a settlement

had been reached at the conclusion of the formal hearing. After the hearing, Complainant opposed the enforcement of the settlement based on a claim of duress. Based on *Tankersley v. Triple Crown Services, Inc*., 92- STA-8 (Sec'y Oct. 17, 1994) and *Eash v. Roadway Express, Inc.*, ARB No. 99-037, ALJ No. 1998-STA-28 (ARB Oct. 29, 1999), the ALJ found that where the all the material terms of the settlement and an unequivocal declaration of assent by parties were presented in open court, a valid settlement agreement clearly existed. The ALJ acknowledged that a settlement agreement is voidable on grounds of economic or other duress in certain circumstances, but in the instant case Complainant had failed to demonstrate any actions of Respondent or Respondent's counsel which placed Complainant under duress.

XI. Dismissals

[STAA Whistleblower Digest XI B 1]
DISMISSAL; FAILURE TO PROSECUTE; LACK OF LEGAL TRAINING NOT AN EXCUSE WHERE ALJ AND ARB SCHEDULING ORDERS AND ORDERS TO SHOW CAUSE WERE READILY COMPREHENSIBLE

In ***Tucker v. Connecticut Winpump Co.***, ARB 02-005, ALJ No. 2001-STA-53 (ARB Mar. 15, 2002), the ALJ recommended dismissal for abandonment after Complainant failed, without explanation, to attend a hearing that had already been rescheduled to accommodate Complainant; failed to respond to the ALJ's order to show cause following Complainant's failure to show up for the hearing; and failed to respond timely to the ARB's briefing order. In affirming the recommended dismissal, the ARB observed that, although Complainant appeared *pro se*, both the ALJ's and ARB's scheduling orders and orders to show cause -- and the deadlines set therein --were readily comprehensible, and lack of legal training could not explain the failure to respond to those orders.

[STAA Whistleblower Digest XI B 1]
FAILURE TO FILE OPENING BRIEF; FAILURE TO PROSECUTE BEFORE ARB MAY RESULT IN DISMISSAL IN ERA CASE, BUT MERITS ARE STILL REVIEWED IN STAA CASE

See the casenote comparing ***Reid v. Niagara Mohawk Power Corp.***, ARB No. 01-083, ALJ No. 2001-ERA-26 (ARB Dec. 10, 2001), and ***Tucker v. Connecticut Winpump Co.***, ARB 02-005, ALJ No. 2001-STA-53 (ARB Mar. 15, 2002), under the Nuclear and Environmental Digest XVIII C 5 above.

[STAA Whistleblower Digest XI b 3]
DISMISSAL FOR CAUSE; MISCONDUCT OF COMPLAINANT

In ***Somerson v. Mail Contractors of America***, 2002-STA-18 and 19 (ALJ Feb. 20, 2002), the ALJ recommended dismissal of the complaint under the Administrative Procedure Act, 5 U.S.C. § 556(c), and the OALJ Rules of Practice and Procedure at 29 C.F.R. §§ 18.36 and 18.6(d)(2), where Complainant was found to have "willfully and intentionally violated court orders, abused personnel

during telephone calls, and finally, so disrupted the conduct of the formal hearing that it had to be terminated." Slip op. at 8. The ALJ also found that Complainant, due to his conduct, waived the right to present evidence in support of his complaints, and therefore drew inferences that Complainant had no evidence to support his allegations under the employee protection provision of the STAA. The ALJ also inferred that all actions taken by Respondent which were the subject of Complainant's complaints, as amended, were taken without regard to any protected activity by Complainant.

[STAA Whistleblower Digest XI B 3]

TERMINATION OF HEARING BASED ON COMPLAINANT'S MISCONDUCT; CERTIFICATION OF FACTS TO UNITED STATES DISTRICT COURT

In ***Somerson v. Mail Contractors of America***, 2002-STA-18 and 19, the ALJ had been required to terminate the hearing and have Complainant escorted from the courtroom because of his disruptive conduct. Complainant had earlier violated court orders and been abusive to court personnel on the telephone.

The ALJ subsequently certified the facts to the United States District Court in the jurisdiction where the hearing took place for appropriate remedies pursuant to 29 C.F.R. § 18.29(b). ***Somerson v. Mail Contractors of America***, 2002-STA-18 and 19 (ALJ Feb. 12, 2002). The U.S. District Court then ordered Complainant to appear before it for an explanation of the allegations against him, the potential penalties, and the proceedings that will take place requiring that Complainant show cause why he should not be held in contempt for his conduct. The U.S. Attorney's office was directed to prosecute the proceedings.

At the time of the writing of this casenote, the preliminary hearing was conducted, but a final disposition of the matter had not yet taken place.